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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONER

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While we are reluctant to add to the papers already filed in this case, we file this supplemental reply brief because it has just come to our attention that the United States, in an important railway labor case, is seeking an injunction to prevent a carrier from

putting its Section 6 proposals into effect on the ground that, although all formal procedures of the Railway Labor Act have been exhausted, the carrier violated Section 2 First. The case is a continuation of the *Florida East Coast Railway Company* litigation. Those proceedings are fully described in a brief by the United States that we have lodged with the Clerk. In sum, the situation is this:

The strike against the Florida East Coast Railway Company, which arose out of "the Nation's longest railroad labor dispute," *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 371 (1969), has been before this Court four times in one way or another. *Brotherhood of Ry. Clerks* v. *Florida E.C. R.R.*, 384 U.S. 238 (1966); *Atlantic C.L. R. Co.* v. *Brotherhood of R.R. Trainmen*, 385 U.S. 20 (1966); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co., supra; Atlantic C.L. R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

The current district court proceeding, *United States* v. *Florida East Coast Railway Company* (No. 64-107-Civ.-J, M.D. Fla.), is a continuation of the litigation that was commenced by the United States in 1964 and that led to one of this Court's decisions, *Brotherhood of Ry. Clerks* v. *Florida E.C.R.R., supra.* There, this Court held that, even though the railroad had not exhausted the procedures of the Railway Labor Act with respect to changes that it wished to make in the existing collective bargaining agreements, the District Court could, under strike conditions, authorize those changes "reasonably necessary" for the railroad to continue its operations, provided that the court "sat-

isf[ied] itself that the carrier is engaged in a good-faith effort to restore service to the public. . . ." 384 U.S., at 247-248, note 8.

Thereafter, the railroad exhausted the formal procedures of the Act with respect to its Section 6 notice, which proposed a wide-ranging reformation of the existing agreements. After mediation sessions had been held, the National Mediation Board, having "recognize[d] the hopelessness of trying to bring the parties together," terminated its services in February of 1969 (Gov't Br. pp. 11, 36). The attempt by the railroad to put its proposals into effect upon expiration of the 30-day "cooling off" period, however, was halted by the District Court upon the application of the unions, who relied, *inter alia,* upon allegations that the railroad "had not complied with its duty to bargain in good faith over its proposals" (Gov't Br. p. 12). Indeed, the court found the railroad in contempt for having implemented the notices without court approval (*ibid.*).

The case is set for final trial, as we understand it, in March of this year. While there are several issues involved, such as the Government's motion for a judgment of contempt (Gov't Br. p. 16), "[t]he most significant issue to be ultimately adjudicated in this case is whether the defendant may implement its § 6 notices" (Gov't Br. p. 19). And as to that, the principal challenge made by the United States is that the railroad has not "satisfied the RLA's good-faith requirements which are essential to the right to implement § 6 notices" (*ibid.*). As the United States puts it, "The question to be considered here is whether defendant can be permitted to institute unilaterally those

changes in rates of pay, rules, and working conditions over which it has failed to bargain, thereby cutting out the heart of the Act and profiting from its own unlawful conduct" (Br. p. 34).

In its brief, the Government first discusses the facts that, it maintains, show that the railroad was "merely 'going through the motions of negotiating' and waiting for the clock to run out" in order to exercise self-help (Br. p. 28). The Government's allegations are not different in principle from the allegations made by petitioner in the case at bar. This is how the Government summarizes its charges:

> "Perhaps no individual act or position of FEC constitutes 'bad faith' bargaining. But when viewed in their totality, we submit, FEC's actions —e.g., its requirement that one agreement govern its relations with all organizations or there be no agreement at all; its additional refusal to even discuss the underlying strike issue; its insistence upon a clause reserving to itself unilateral control over virtually all rules and working conditions; its constant 'fouls' with the law; its adamant demands for the same provisions which it had unlawfully installed after the commencement of the strike; its *sub rosa* contracting while insisting upon an expanded future right to contract out work; and its refusal to discuss the union's counterproposals—coupled with the fact that the unions clearly could not agree to many of these positions without change or modification, manifest its wish to defeat agreement in violation of its duty to bargain under Section 2 First of the Act. This record, as a whole, strongly indicates that the carrier had no desire to end the strike, but really intended to use the strike as a basis for scrapping the existing agreements and instituting its own changes . . ." (Br. p. 33).

Next, the Government analyzes in detail the authorities supporting its contention that "a party to a Railway Labor Act agreement cannot implement a Section 6 notice if it has failed to bargain over the notice in good faith notwithstanding termination of the NMB's services and running of the cooling off period" (Br. p. 34). They are the same authorities upon which we rely.

As to public policy, the United States says this:

> "When Congress first enacted the Railway Labor Act in 1926, it seized upon collective bargaining as the tool most consistent with our free enterprise economy to prevent labor disputes from interrupting commerce. Consistent with Congress' belief that labor strife will be minimized if management and labor can be brought together in an honest effort to iron out their differences, the Act's overriding purpose is to further collective bargaining. It must be emphasized that the Act is not a compulsory arbitration statute; without the parties' genuine, good-faith efforts to reach agreement, perfunctory compliance with its machinery accomplishes nothing, other than a mere temporary postponement of the labor strife and interruptions to commerce Congress sought to prevent. Good faith bargaining is not only the 'heart of the Act'; it is also the cornerstone on which our national labor policy rests. To construe the Act in the way defendant urges, we submit, would have serious repercussions on this important national policy. For as a practical matter, there is no distinction between token compliance with the Act's procedures and the noncompliance condemned in such strong terms by the Supreme Court in 1966. *Brotherhood of Railway Clerks* v. *Florida East Coast Ry., supra,* 384 U.S. at 247. Herein lies the public interest which caused the United States

> to file this action in 1964 and which leads it to oppose defendant's motion now."

This case is relevant not only because it discloses that the Government shares our view of the importance and enforceability of Section 2 First—though surely it is not without interest that the Government maintains today the same position that it urged in *Virginian* and in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union,* 187 F.Supp. 581 (W.D.N.Y. 1960) (see our opening brief at pp. 49, 76). More importantly, the case discloses in a concrete way how the role of Section 2 First for which we contend would secure *both* parties against the exercise of self-help by the other if the right to self-help had not been earned by good-faith bargaining and why that result secures the public interest. Of course, the Government's charges may turn out to be unfounded. But in another case similar charges might

be true. The decision in the case at bar will determine whether such charges may be entertained.*

Respectfully submitted,

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* As to another matter, we add that additional research has uncovered five more cases under the Labor Management Relations Act in which injunctions against strikes, either pending NLRB action or by way of enforcement of an NLRB order, were granted by courts where a violation of the good faith bargaining requirement was involved. See *Local 164 Brotherhood of Painters* v. *NLRB*, 293 F.2d 133 (D.C. Cir. 1961), *enforcing 126 NLRB No. 111*, 45 LRRM 1421, 1422 (1960); *Schneid* v. *District 50, UMW*, 33 CCH Lab. Cas. ¶ 70,885 (N.D. Ill. 1957); *Local 219, Retail Clerks Int'l Ass'n* v. *NLRB*, 265 F.2d 814 (D.C. Cir. 1959), *enforcing* 120 NLRB No. 48, 41 LRRM 1479, 1480 (1958); *Pennello* v. *International Union, UMW*, 88 F. Supp. 935 (D.D.C. 1950), injunction printed at 25 LRRM 2368, 2374; *Kaynard* v. *Communications Workers*, 61 CCH Lab. Cas. ¶ 10,485 (E.D.N.Y. 1969). This casts additional doubt on the *amicus curiae's* assertion as to the "normal remedy" under the LRMA. See our reply brief p. 30 note 12.